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Responsabilité médicale

The following papers were presented at a colloquium on medical liability, held in October 1986, at McGill University, under the auspices of the Association québécoise pour l'étude comparative du droit. In the first paper, Professor Jobin outlines the problems which the victims of medical malpractice face in their claims and he raises the question whether the time has come for some reform, be it comprehensive or partial, in this area of the law. By way of comparison, he evokes major changes operated by the Québec courts or Legislature in the law of compensation of bodily injuries, and the reasons for their implementation.

In the second paper, Professor Baudouin gives a brief picture of Québec positive law on medical liability. He notes a number of points which are encouraging, such as the position of the courts nowadays on the standard of care, the proof of fault, the assessment of non-economic loss and the expanding practice of structured settlements. The author doubts that Québec law is presently going through a real crisis in this area. However, he is concerned with a number of problems, such as the inconsistency of the courts on the concept of causality, the excessive consequences which they give to the lack of consent to medical treatment and the distinctions that they introduced in the hospital's liability for the negligence of the physician practicing in its facilities. He makes proposals for limited reforms, namely on the role and method of appointment of expert witnesses and on alternative or preliminary non-judicial mechanisms of adjudication.

In the third paper, Professor Tunc starts by contrasting the different degrees of satisfaction generated by medical liability in France: if physicians have no major cause of complaint about the system, victims, on the other hand, have good reasons to be critical. A recent survey conducted by the European Science Foundation shows that the problems experienced in France are common to the vast majority of Western European countries. They include proof of fault, access to the medical record and reticence of expert witnesses to testify against their fellow physicians.

In Europe as in the United States, Professor Tunc and others advocate the substitution of an insurance-type system of compensation for the present fault-based system in this area. Liability based on fault is plagued with problems that result in the inadequate compensation of victims. Moreover, that system is unfair to physicians as well, since it confuses mere mistake, which is unavoidable even for a very good physician, with true negligence. The cases of incompetence,

carelessness and other types of real negligence should be controlled and sanctioned primarily by peers and, in very serious cases, by criminal law.

These views find support in the European Science Foundation's report. It shows that, of all the countries surveyed, Sweden is the only one where both victims and physicians are satisfied with the system of compensation. Throughout Sweden, Regional Medical Boards have formally undertaken to compensate a patient in any case where the result of medical care would not be normal — with limited exceptions. The Board's liability is covered by private insurance, which is also available to physicians not associated with a Board. Since the implementation of this scheme in 1975, medical liability litigation has practically disappeared from Sweden. The cost of the plan is remarkably low. The author believes that a very similar compensation plan could easily be introduced in any country of the Western World. In jurisdictions where social insurance is less extensive than in Sweden, the plan would pay for a larger share of the loss suffered but its cost would still remain very reasonable.